STATE OF MICHIGAN

COURT OF APPEALS

BERRYMAN PROPERTIES

Plaintiff/Counter-Defendant-Appellant,

and

ROBERT CHRISTOPHER BERRYMAN and TAMARA MARIE BERRYMAN,

Plaintiffs-Appellants,

v

P. KELLY O'DEA and P. KELLY O'DEA, J.D., P.C.,

Defendants/Counter-Plaintiffs,

and

THOMAS JAMNIK, J.D., P.C., a/k/a O'DEA & JAMNIK, P.C., and THOMAS JAMNIK,

Defendants,

and

ROBERT K. KOSTIN and ROBERT E. KOSTIN, P.C.

Defendants-Appellees.

UNPUBLISHED
September 23, 2004

No. 248718
Oakland Circuit Court
LC No. 2002-041706-NM

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendants Robert E. Kostin and Robert E. Kostin, P.C., summary disposition under MCR 2.116(C)(10). This case arises from plaintiffs' dispute with the potential buyer of real estate that plaintiffs owned. Berryman Properties, Inc. (BPI) retained three different attorneys in the dispute, Robert E. Kostin, P. Kelly O'Dea, and Thomas Jamnik (collectively "defendants"). After two attempted sales of the disputed property fell through because of pending litigation, plaintiffs sued defendants alleging legal malpractice. Essentially, plaintiffs alleged that the lawsuit was unnecessarily prolonged because defendants failed to timely move for summary disposition. We affirm.

Plaintiffs first argue that this Court should disregard an oral extension of discovery by the trial court in the underlying case because it was ineffective. Plaintiffs claim the court never entered a written order extending the discovery deadline. Also, Kostin was not insulated by any successor counsel's negligence because the last effective scheduling deadline passed while Kostin was still representing BPI and Kostin admitted that he never moved for summary disposition.

We review de novo a trial court's ruling on a motion for summary disposition and the interpretation and application of court rules. *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich App 241, 243; 657 NW2d 143 (2002), lv gtd 469 Mich 947, 671 NW2d 54 (2003); *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000). But we review a court's decision whether to allow further filings after a discovery deadline for an abuse of discretion. *Gerling*, *supra* at 243. A motion brought under MCR 2.116(C)(10) tests the factual support for a claim, and the court must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); see, also, MCR 2.116(G)(4) and (5).

We agree with plaintiffs that to be effective, the court's extension of the deadline for extending discovery should have been expressed in a written order. *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987) (stating that courts speak through their written orders, not their oral statements). But it does not matter for what date the dispositive motion deadline was set because a trial court abuses its discretion by denying a motion for summary disposition based on MCR 2.116(C)(4), (8), (9), or (10) solely because the motion was filed beyond the date set in the scheduling order. MCR 2.116(D)(3); *Gerling*, *supra* at 248. Further, we reject plaintiffs argument that *Gerling* is distinguishable on the ground that here the scheduling order was a stipulated order. Parties cannot stipulate to forgo the application of the court rules. *Staff*, *supra* at 529, 535. Accordingly, *Gerling* is directly on point, and the fact that the last written scheduling order that contained a dispositive motion cutoff expired on Kostin's "watch" cannot, as a matter of law, have caused plaintiffs any harm. The trial court would have entertained a motion for summary disposition on the basis of MCR 2.116(C) (10) at any time, whether brought by Kostin or any successor counsel. MCR 2.116(D)(3); *Gerling*, *supra* at 248.

Therefore, we affirm the trial court's grant of summary disposition on the ground that Kostin's failure to file a motion for summary disposition was not the proximate cause of

plaintiffs' damages when under MCR 2.116(D)(3), motions for summary disposition brought under MCR 2.116(C)(10) are permissible at any time.[1] This Court will not reverse where the right result is reached for the wrong reason. *Ellsworth v Hotel Corp,* 236 Mich App 185, 190; 600 NW2d 129 (1999).

Plaintiffs next argue that Kostin's failure to move for summary disposition was not a tactical decision because he admitted that he mistakenly believed that a dispositive motion before case evaluation would be premature. We disagree.

To establish legal malpractice, plaintiffs must prove all of the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), citing and quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Here, there is no dispute that the requisite relationship existed between Kostin and plaintiffs. Therefore, "the issue is not whether a duty existed, but rather the extent of that duty once invoked." *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). To prove proximate cause, plaintiffs must first establish that defendant's actions were the cause in fact of the alleged injury. *Charles Reinhart, supra* at 586. Thus, plaintiffs, "'must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit.'" *Id.*, quoting *Coleman, supra* at 63.

We conclude that Kostin's decision not to file a motion for summary disposition was not a breach of duty. Although Kostin admitted that he believed that the court would not entertain a motion for summary disposition until after case evaluation, this was, at most, a mere error in judgment and does not rise to the level of a gross error. See *Simko, supra* at 658; *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 694; 310 NW2d 26 (1981). Moreover, his decision not to file the motion was a tactical decision based on his determination that filing such a motion would have been a waste of time and money because of the remaining discovery issues. See *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). Kostin filed several motions with the court and corresponded with the discovery master in an effort to obtain necessary discovery from Markovitz. Before he could obtain the necessary documents, Kostin was granted permission to withdraw as counsel based on a breakdown in the attorney-client relationship. We believe Kostin exercised reasonable care and judgment in determining that a motion was not yet worth pursuing. *Id.* at 678.

Last, plaintiffs argue that it was the trial court's duty to determine as a matter of law, whether plaintiffs would have succeeded in arguing in a motion for summary disposition in the

---

[1] Defendants P. Kelly O'Dea and P. Kelly O'Dea, J.D., P.C., were dismissed in the lower court proceedings and are not parties to this appeal. Thus, the propriety of the trial court's decision to deny O'Dea's later motion to extend the scheduling order to allow for filing a dispositive motion is not presented before this Court in this appeal.

underlying case on the ground that it was undisputed Markovitz never tendered consideration to purchase Unit 4. We disagree.

In general, a trial court will not grant specific performance unless the party seeking relief has tendered full performance. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982). But full tender may be excused where it would not have been accepted. *Hanesworth v Hendrickson*, 320 Mich 577, 579; 31 NW2d 726 (1948). A court will also consider whether the party seeking specific performance had the ability to fully perform. *Id*. at 579-580. These are factual issues which require the presentation of evidence to resolve. Here, the parties presented substantial evidence at the arbitration proceedings to resolve these factual issues. Those proceedings required thirteen days to present eleven witnesses' testimony and over 150 exhibits; the testimony differed significantly on the key issues. At the time Kostin withdrew, he was still trying to secure necessary discovery, including requests to admit, interrogatories, and most importantly, Markovitz's deposition. We agree with the trial court that even if Kostin had filed the motion it is unlikely that the trial court in the underlying suit would have granted summary disposition, because key discovery was incomplete and significant issues of fact remained.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey